IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 10525 of 2003
WITH
SPECIAL CIVIL APPLICATION NOS. 10524 and
10526 OF 2003.

For Approval and Signature:

HON'BLE MR.JUSTICE KUNDAN SINGH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

SHIKHAR YARNS PVT. LTD.

Versus

SURAT PEOPLE'S CO-OPERATIVE BANK LTD.

Appearance:
Mr. Mihir Joshi with MR ANSHIN H DESAI for Petitioner No. 1-2
Mr. Suresh N Shelat, Advocate General with
MR NV ANJARIA for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE KUNDAN SINGH

Date of decision: 5/12/2003

CAV JUDGEMENT

1. The petitioner no.2 is a shareholder and Managing Director of petitioner no.1 company in all the three petitions and the common question of law is required to be determined in all the aforesaid three petitions. Therefore, they are being disposed of by this common judgment.

2. In all these petitions, notice dated 24th May, 2003 issued by the respondent bank in exercise of the powers under sub-section (1) of section 13 of The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as the Act) has been challenged by the petitioners, whereby the respondent bank has issued notice to the effect to take possession of secured assets of the petitioner company including right of transfer by way of lease, assign or sale for realising secured assets and (2) to take over the management of the secured assets of the petitioner company including right of transfer by way of lease, assign or sale for realisation of the secured assets.

3. The petitioner no.1 company set up its unit of manufacturing textile yarn by installing one texturising machine and eight twisting machines for which term loan facility to the tune of Rs. 70 lacs (approximately) and Rs.35 lacs (approximately) was availed from GIIC and GSFC respectively. The working capital facility for the said project to the tune of Rs. 1 crore was availed from Karnataka Bank Ltd. (KBL) in the year 1991 and NTIL extended its manufacturing facility by installing other texturising machines and five twisting machines for which loan of Rs. 86,10,000/- (approximately) was availed from IFCL. In the year 1993, two private limited companies were incorporated being Parshva Textiles Pvt. Ltd. an Shikhar Yarn Pvt. Ltd. Thee companies are subsidiaries of the petitioner company. The term loan of Rs. 1,45,60,00/- (Approximately) for these projects was also availed from GIIC and the working capital facility of Rs.1,00,00,000/- was availed from K.B.L. Due to financial crisis and financial assistance given very late by the respondent Bank, hence the position of the petitioner company became very imbalancing. The respondent bank gave a notice under section 13(2) of the Act to the petitioner company hence the petitioner filed a writ petition in this Court. In the proceedings of the earlier petition, the learned advocate appearing on behalf of the respondent bank filed an affidavit made by the General Manager of the Bank stating that the impugned

notice in the petition issued under section 13(2) of the Act shall not be acted upon and in this view of the matter, the cause of action of the petitioner did not survive. Hence, the petition being Special Civil Application no. 10940 of 2002 was dismissed as not pressed on 10.4.2003. During the hearing before BIFR on 5.9.2002, the respondent bank submitted a Miscellaneous Application praying that the BIFR should first decide preliminary issue as to whether Reference pending before it would abate in view of 2nd proviso inserted in section 15(1) of SICA by section 41 of the Act. The petitioner submitted that the total amount claimed by the secured creditors being KBL, GIIC and the respondent bank was Rs. 20,55,67,767/constituting around 62% of the total amount claimed. The amount claimed by GIIC was Rs.1,50,09,715/constituting around 8% of the total amount claimed and the amount claimed by the respondent was Rs. 6,15,72,090/- constituting around 29.95% of the total amount. Therefore, the referred proviso could not be invoked at all. As such, the respondent bank had no authority in law to invoke the Act as it was not a secured creditor as contemplated under the Act. Thereafter, the petitioner received another notice dated 24th September, 2002 issued by the respondent purported to have been under sections 13(2) and 13(3) of the Act that secured assets being plant, machineries, equipments, land and building, residential flats and shares of joint stock companies as listed in the schedule thereto were intended to be enforced by the respondent in the event of non-payment of the secured debts by the petitioner within 60 days from the date of notice. It was also stated that there is an overlapping charge on the land, building, plant and machinery in favour of other secured creditors being GIIC and KBL. Hence, the notice under section 13(2) of the Act issued by the respondent bank in exercise of the powers under section 13(2) of the Act is otherwise without authority of law and no measures under section 13(2) can be taken by a secured creditor representing less than 3/4th in the value of the amount outstanding as on the record date. The BIFR has declared the petitioner company unit as a sick industry on 30th October, 2002 under section 3(1)(o) of SICA. The BIFR order reads as under:

"The promoter/guarantors should not change their shareholding pattern nor alienate/encumber or dispose of their shares in the company in any manner and also the assets of the promoters and guarantors would not be disposed of/alienated/encumbered during this period as they would be enjoying the protection under

section 22(1) of the Act."

After the order dated 10.4.2003 passed in Special Civil Application no. 10940 of 2002, the respondent bank cannot issue a notice dated 24th May, 2003 under section 13(2) of the Act which was under challenge in Special Civil Application no. 10940 of 2002. It was also stated that there is an overlapping charges on the land, building, plant, machinery in favour of other secured creditors being GIIC and KBL and the respondent secured creditor is less than 3/4th of the value of the amount outstanding as on the record date as required under section 13(9) of the Act and asked the respondent bank to withdraw the notice. It is stated that the impugned notice deserves to be quashed and set aside on the ground that BIFR has declared the petitioner company a sick unit under section 3(1)(o) of SICA and in para-17 of the order of the BIFR in clause (i) protection under section 22(1) of the SICA has been granted. Once the respondent bank has made a statement before this Court that it will not act upon the notice under section 13(2) of the Act which was issued earlier in point of time, it is not open for the respondent bank to issued notice again which amounts to misuse of process of court. The respondent bank has made an attempt to stall the revival of the proceedings by raising undue objections before the BIFR and making allegations against the promoters which are incorrect to its knowledge. The respondent bank also made an application before BIFR for permission to initiate recovery proceedings and simultaneously invoke the provisions of the Act. The respondent bank does not have exclusive charge over the assets of the petitioner. The respondent has appropriated to itself an amount of Rs. 22,54,388/- received by the petitioner on account of loss caused due to the earthquake, from the New India Assurance Company. The respondent has not released original documents relating to one flat at Pratistha Awas to complete the transfer in favour of a third party though the flat was sold with the permission of the respondent and the entire proceeds thereof were also deposited with the respondent bank. The respondent bank powers for taking over possession with the help of Magistrate are taken which they cannot be called upon in question, an appeal against any illegality is contemplated only after the possession is taken over. Therefore, the petitioners have filed these petitions.

5. The respondent has filed affidavit-in-reply stating therein that no fundamental right or legal right of the petitioners has been abridged by any action of the respondent bank. Therefore, the

petitioners are not entitled to invoke extraordinary jurisdiction of this Court under Article 226 of the Constitution. Under section 17 of the Act, remedy of appeal is available to the petitioner before Debt Recovery Tribunal. As statutory alternative remedy is available to the petitioners, this petition is not maintainable. It is also stated that the petitioner company has separately obtained financial assistance by way of term loan from the bank to the tune of Rs. 4,27,26,000/- on 12.2.1998 and has committed the default in payment of the said secured debt. Outstanding dues in respect of the said loan obtained is Rs. 7,15,62,418/which comprises the principal and interest amount of Rs. 3,74,49,488/- and Rs. 3,41,12,930/respectively. The respondent bank has issued notice dated 24th May, 2003 to the petitioner company. The petitioner company has committed default as a borrower of the bank. A statement showing the security details of the properties hypothecated, mortgaged to the bank in respect of the aforesaid debt is forming part of the petition at Annexure"A". On non-payment of the loan amount by the petitioner, the petitioner company is a defaulter within the meaning of section 2(1)(j) of the Act. The respondent bank has independently extended financial assistance by way of term loan to the petitioner company which is a financial asset in respect of which an amount of Rs. 7,15,62,418/is outstanding as per books of accounts of the respondent bank without involving any other bank or any consortium or group of banks or financial institutions. The provisions of section 13(9) of the Act, require the consent of other secured creditors or creditors representing3/4th in value of the amount outstanding are not attracted in the present case. No other secured creditor is representing in the value of the amount outstanding because the respondent bank is representing 100% in value of the amount outstanding. The ex parte interim order was obtained by the petitioner restraining the bank from taking over possession and/or management of the secured assets of the petitioner. Unless written consent of the creditors representing 75% or more interest in the secured assets is obtained by the respondent bank is not attracted in respect of the respondent bank. It is further stated that the said ad-interim order was obtained by misleading this Court on the facts inasmuch as the respondent has independently extended financial assistance by way of term loan to the petitioner company which is a financial asset in respect of which an amount of Rs. 7,15,62,418/- is outstanding as per the books of the respondent bank without involving any other bank or any consortium or group of banks or financial institution

was deliberately suppressed. As the statutory period of sixty days has already expired, the right to take measures contemplated under section 13(4) of the Act have accrued and vested with the bank and the only recourse available to the petitioner company is to approach the Debt Recovery Tribunal under section 17 of the Act. The proceedings initiated by the petitioner company under SICA has lost its efficacy in view of the subsequent invocation of the powers under the Act by the respondent bank. Section 35 of the Act provides that the provision of the Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law. Section 37 of the Act provides that the provisions of the Act shall be in addition to and not in derogation of other laws. The proceedings before the BIFR no more remain germane after the invocation of section 13(2) of the Act. In respect of the subsidiary company of the petitioner company, while rejecting the reference under section 15(1) of the SICA, BIFR has made the following remarks.

"It is very clear from the foregoing that the financial accounts of the company are totally unreliable and the promoters are not of clean hands. The co./promoters have deliberately manipulated the books of accounts and diverted funds. Hence, the reference made by the company under section 15(1) is rejected as non maintainable."

The appeal before AAIFR by the said company was not allowed and the rejection of reference was confirmed. The petition being Special Civil Application no. 10940 of 2002 has been disposed of in view of the notification dated 28th January, 2003 covering co-operative banks for the purpose of the said Act. Hence, the respondent bank has issued the impugned notice afresh. In the order dated 30th October, 2002 of the BIFR, no direction has been given to the respondent bank as secured creditor. On the contrary, the direction is given to the promoters/guarantors and not to the respondent bank. Therefore, there is no need of obtaining any consent of BIFR. Such protection is no bar on the issue of impugned notice under the provisions of the Act. The insertion of proviso to section 15(1) of SICA by section 41 of the Act is in supplementation and in furtherance of the objects and reasons and intention of the Act. The provisions of the Act have an overriding effect over the provisions of SICA and all other law for the time being in force which may be inconsistent with the provisions of the Act. The words "secured creditors" used in section 13(9) of the Act as well as in section 41 of the Act read with second

schedule of amendment in section 15 of SICA by insertion of the 2nd proviso to section 51 of SICA is with reference to the financial assistance by a financial asset when financing of a financial asset is given by more than one bank or financial institution as consortium or group of banks or financial institutions as stipulated in the definition of "secured creditor" in section 2(1)(zd) of the Act.

6. It is also stated that when the financing of a financial asset is done by the second category (by more than one financial institution), then only requirement of consent of secured creditors representing 75% or more in value of the amount outstanding is required and not otherwise. It is also stated that a financial asset is read as financial asset in section 13(9) of the Act in respect of different financial assistance by more than one different banks/financial institutions. Then in that case, there would be different amounts outstanding in the books of such respective banks/financial institution, secured by the same or different assets as is stated by the petitioner, then the scheme of the said Act would not remain workable because in all cases of such different financial institutions/banks of such secured creditors may not have classified their secured debts as non performing assets as stipulated under section 13(2) of the Act or such secured debts of such other secured creditors may not have classified their secured debts as non performing assets as stipulated under section 13(2) of the Act or such secured debts of such other secured creditors may notbe classifiable under the RBI directives and even if all of them have classified their secured debts as non performing assets, some of them may not consider worthwhile for their own reasons to take recourse to section 13(2) of the said Act . The provisions of the Act of 2002 have an overriding effect over SICA and all other laws for the time being in force which may be inconsistent with the provisions of the Act. The words "secured creditors" used in section 13(9) of the Act as well as in section 41 of the Act read with second schedule of amendments in section 15 of SICA by insertion of 2nd proviso to section 51 of SICA is with reference to financial institutions. A financial assistance, a financial asset when financing of a financial asset is done by more than one bank or financial institution as consortium or group of banks or financial institutions as stipulated in in the definition of "secured creditor in section 2(1)(zd) of the Act.

7. It is also stated that when the financing

of a financial asset is done by the second category, then only requirement of consent of secured creditors representing 75% or more in value of the amount outstanding is required and not otherwise, but the respondent's case relates relates to 100% in the amount outstanding. A financial asset is read as financial assets in section 13(9) of the Act in respect of different financial assistance by more than one different banks/financial institutions, then in that case there would be different amounts outstanding in the books of such respective banks/financial institutions. Then in that case there would be different amounts outstanding in the books of such respective banks/financial institutions secured by the same or different assets as is stated by the petitioner company, then the scheme of the said Act would not remain workable because in all cases of such different banks/financial institutions, all such secured creditors may not have classified their secured debts as non performing assets as stipulated under section 13(2) of the Act or such debts of such other secured creditors may not be classifiable under RBI directives and even if all of them have classified their secured debts as non performing assets, some of them may not consider worthwhile for their own reasons to take recourse to section 13(2) of the Act or to give consent to other independent secured creditor who may have taken recourse to the provisions of the Act for recovery or security interest of some other secured creditors may be such like lien or pledge that to them provisions of Act may not be applicable as stipulated under section 31 of the Act so as to enable them to enforce their security interest. It is also stated that three different financial assistance were extended at different times to the borrower petitioner company including by the respondent bank by way of term loan against security of hypothecation of machineries and equitable mortgage of land (two by GIIC by way of term loan against security of hypothecation of the same machinery and equitable mortgage of the same land and by KBL by way of overdraft facilities against security of stock prime security and hypothecation of the same machinery and equitable mortgage of different lands as collateral securities. The contention that the amount outstanding in respect of three financial institutions which are three different assets in their respective books of accounts should be clubbed for the purpose of requirement of consent of secured creditors representing 3/4th in the value of the amount outstanding is not tenable in law. The security given to secured creditors in respect of a financial assistance given by it, which is a financial asset in its books of account in respect of which particular amount is outstanding are overlapping

with the securities given by the same borrower to other banks/financial institutions in respect of different financial assistance at different times is irrelevant as far as secured creditor who has independently financed a financial asset is concerned. If the respondent bank takes possession of secured assets under section 13(4) of the said Act and after recovery of the amount holding the same in trust to be applied as stipulated under section 13(7) of the Act in accordance with the rights and interests of the respective persons. Notice under section 13(2) is competent and permissible in law for the bank to individually proceed under the Act against the petitioner company for the recovery of debt as secured creditor. The respondent bank is empowered
and authorised to take recourse to the provisions of the Act independently in the facts and circusmtances of the case. It is also denied that the reference to the submission made in the petition that the impugned action is contrary to the provisions of SICA and particularly section 22 as alleged. The provisions of section 22 of SICA do not create any bar in the facts and circumstances in view of the clear over-riding provisions of the Act in their applicability over all other laws by the legislature. The Parliament has amended section 15 of SICA by inserting two provisions to sub-section (1) of section 15. The provisos inserted are as under:

"Provided further that no reference shall be made to the Board for Industrial and Financial Reconstruction after the commencement of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, where financial assets have been acquired by any securitisation company or reconstruction company under sub-section (1) of section 5 of that Act.

Provided also that on or after the commencement of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, where a reference is pending before the Board for Industrial and Financial Recosntruction, such reference shall abate if the secured creditors, representing not less than 3/4th in value of the amount outstanding against financial assistance disbursed to the borrower of such secured creditors, have taken any measures to recover their secured debt under sub-section(4) of section 13 of that Act."

8. The provision in the context of 3/4th in
the value of the amount against financial assistance has

to be read with sub-section (9) of section 13 which deals with the cases of financing of a financial asset (singular) by more than one secured creditors or joint financing by a consortium or groups of creditors. The bank has given loan to the petitioner company individually and there is no joint or consortium finance with any other creditor so as to attract the conditions in the second proviso to section 15(1) of SICA. By the insertion of the aforesaid two provisos, the Parliament has intended that no reference will be made to the BIFR after the commencement of the Act. The first proviso makes it clear. So far as the second proviso is concerned, it provides that if there is a reference pending before BIFR on or after the commencement of the Act, such reference shall abate if secured creditors representing not less than 3/4th value of the amount outstanding against financial institutions, asset (singular) is to the borrower. The secured creditors of 2nd category have taken any measures to recover their secured debt (against singular) under section 13(4) of the Act. Since the respondent bank has extended 100% financial assistance by wayof term loan to the petitioner company independently without involving any other bank or financial institution and since no other bank is representing 100% value of the amount outstanding, admittedly, the reference is pending before BIFR and the said reference automatically abates with the initiation of measures by the respondent bank under section 13 of the Act. It is also denied that the proceedings before BIFR and under the Act are simultaneously invoked by the bank. It is permissible in law for the respondent bank which has taken recourse under the provisions of the Act once it is brought in to force. The Act empowers the respondent bank to proceed to recover the dues from the petitioner company notwithstanding and irrespective of the pending proceedings before BIFR. The BIFR proceedings are devoid of any efficacy in law and in that respect, no contention can be raised with reference to such proceedings. The notice contains all requisite details of the amount payable by the petitioner borrower company. It is also denied that the impugned notice demands a lumpsum amount as alleged and that is obliviously excessive or exaggerated as alleged or it does not give any details as contemplated under the Act. The Act does not place any embargo of any kind over a secured creditor individually enforcing its security interest under the Act. The provisions are classified in separate chapter and have distinct group of provisions, therefore, are mutually exclusive in their operation and applicability. In view of the above, these petitions require to be dismissed.

9. I have carefully considered the contentions raised by the learned counsel for the parties. The main question involved in these petitions is where financial assets have been financed by more than one secured creditor separately to a borrower whether the provisions of section 13(9) of the Act would be attracted and a secured creditor is entitled for taking action under section 13(4) of the Act without taking consent of other secured creditors as contemplated under section13(9) of the Act ? When any individual secured creditor invokes section 13 of the Act for enforcement of the security interest in respect of its debt against any borrower in default, such secured creditor is not required to obtain consent of all the creditors representing 75% interest in the secured assets under section 13(9) of the Act. The whole Act will become unworkable and the very purpose and object of the legislative enactment will be defeated. The interpretation as sought by the borrower company in respect of the provisions of section 13(9) of the Act would entail absurd result. The Act has provided two types of financial assets (a) financial asset by a singular secured creditor as non-performing assets and which is under section 13(2) of the Act and (b) financing a financial asset by more than one secured creditor or joint financing, a financial asset by a secured creditors which is provided under section 13(9) of the Act. Action is provided under section 13(2) and (4) of the Act by a secured creditor or joint creditors when joint financing of a financial asset by secured creditors. If there is a financial asset by one secured creditor then similarly secured creditor is entitled to take action under section 13(2) of the Act. If any of the creditors who have financed a financial asset by secured creditors, then with the consent of the creditors representing not less than 3/4th in value of the amount outstanding as on record date and such action shall be binding on all the secured creditors, that is, that can also be taken as creditors under section 13(2) of the Act. Relevant portion of section 13(9) is extracted and re-produced as under:

"13(9) : In the case of financing of a financial asset by more than one secured creditors or joint financing of a financial asset by secured creditors, no secured creditor shall be entitled to execise any or all of the rights conferred on him under or pursuant to sub-section(4) unless excercise of such right is agreed upon by the secured creditors representing not less than three-fourth in value of the amount outstanding as on a

record date and such action shall be binding on all the secured creditors."

10. Thus, the provisions of section 13(9) contemplate a situation where the right under section 13(4) is to be enforced by a group of more than one creditor, more than one secured creditor as mentioned in section 13(9) of the Act or by a consortium of creditors, joint finance as provided under section 13(9) of the Act, where a financial asset is financed by more than one secured creditor or where financial asset is financed by a consortium of creditors. The requirement of consent by secured creditors representing not less than 3/4th in value of the amout outstanding as on record date will be relevant. "Secured creditor" is defined in section 2(zd) of the Act. It says that "secured creditor" means any bank or financial institution or any consortium or group of banks or financial institutions and includes (a) debenture trustee appointed by any bank or financial institution (b) securitisation company or reconstruction company or (c) any other trustee holding securities on behalf of a bank or financial institution, in whose favour security interest is created for due repayment by any borrower of any financial assistance. "Financial assistance" is defined in section 2(k) of the Act. "Financial assistance" means any loan or advance granted or any debentures or bonds subscribed or any guarantee given or letters of credit established or any other credit facility extended by any bank or financial institution. "Financial asset" is defined in section 2(l). Financial asset means debt or receivables and includes (i) a claim to any debt or receivables or part thereof, whether secured or unsecured or (ii) any debt or receivables secured by mortgage or charge on, immovable property; or (iii) a mortgage, charge, hypothecation or pledge of movable proeprty; or (iv) any right or interest in the security, whether full or part underlying such debt receivables; or (v) any beneficial interest in property, whether movable or immovable, or in such debt, receivables, whether such interest is existing, future, accuring, conditional or contingent or (vi) any financial assistance. Further section 2(o) defines "non-performing asset" means an asset or account of a borrower, which has been classified by a bank or financial institution as sub-standard, doubtful or loss asset, in accordance with the directions or under guidelines relating to asset classifications issued by the Reserve Bank. Further, it defines non-performing asset to be an asset or account of a borroer which has been classified by a bank or financial assistance in respect of which a bank or

financial institution can take steps against a borrower under section 13(2) of the Act. Thus, "secured creditor" means any bank or any financial institution, consortium of banks or financial institutions or group of banks of financial institutions. The intention of the legislature for the applicability of section 13(9) is only in cases of financing, a financial asset by group of creditors, who had acted simultaneously at the relevant time or in cases of financing a financial asset by a consortium of crediors acting together. Moreover, it also appears from section 13(9) that the financing of a financial asset by a group of creditors at the relevant time acting as joint creditors. In section 13(9) of the Act, the legislature has used plural words, namely "secured creditors" at all material places in the statute. The words "secured creditors" are used in sub-section (2) of section 11 as well as section 13 of the Act and also sub-section 12. It is an explanation in the sense that consent of the secured creditors not less than 3/4th in the value of the amount outstanding will be a condition precedent only in cases where financing of an asset is by more than one secured creditor acting jointly or simultaneously or by a consortium of creditors. But this condition is not intended to apply in cases where individual secured creditor is acting single and who has individually financed a financial asset and which he classified to be non-performing asset, for enforcement of his security interest by invoking the provisions of section 13 of the Act.

11. The learned Single Judge of this Court in the decision reported in 2003(2) GLH, 740 has clearly observed as under:

" Therefore,when the legislature in its wisdom has found it proper to ensue the consequences of abatement of the reference even if in respect of a single financial asset, the measures are taken under section 13(4) of the Act by one of the secured creditors that the consent of the three-fourth of the secured creditors representing the value of the amount outstanding, then in that case it cannot be said that the provisions must be read to the effect that such measures should have been in respect of all financial assets and not a financial asset. When the legislature also used the words " a financial asset"substituting the words "all financial assets" would result into re-writing the language

of the statute or the substitution of the words which Court would not do while exercising the power under Article 226 of the Constitution of India. Hence, the said contention raised on behalf of the petitioners fails."

Sub-section (7) of section 13 of the Act reads as under:

"(7) Where any action has been taken against a borrower under the provisions of sub-section (4), all costs, charges and expenses which, in the opinion of the secured creditor, have been properly incurred by him or any expenses incidental thereto, shall be recoverable from the borrower and the money which is received by the secured creditor shall, in the absence of any contract to the contrary, be held by him in trust, to be applied, firstly, in payment of such costs, charges and expenses and secondly, in discharge of the dues of the secured creditor and the residue of the money so received shall be paid to the person entitled thereto in accordance with his rights and interests."

These provisions provide that (1) taking of action unde sub-section (4) of the Act by the secured creditors subject to condition precedent provided under section 13(9) or by a singular secured creditor is permissible meaning thereby that an individual creditor is given a right to take measures contemplated under section 13(4) of the Act against a defaulting borrower. (2) the amount realised by virtue of taking measures under sub-section (4) will be adjusted towards costs, charges and expenses incurred and then in discharge of dues of the secured creditor concerned (3) it can be seen that a secured creditor is held entitled to recover from the borrower not only costs, charges and expenses properly incurred by him from the amount realised, but also in discharge of his dues in respect of which he has taken recourse to section 13(4)(iii); (4) It is further provided that residue of the money so recovered shall be paid to the person entitled thereto in accordance with his rights and interest. This situation contemplates where more than one secured creditor have financed a financial asset to a borrower acting at different point of time and having their respective charge on such financial assets. If the legislature did not want to confer right on an individual secured creditor to take recourse to the measures of recovery of his dues under

section 13(4), there was no need to incorproate sub-section (7) of section 13 in the Act. Thus, for the applicability of section 13(9), requirements of fulfilling of consent of three-fourth crditors would arise only inrespect of more than one secured creditor acting at a time in case of financing by a consortium of secured creditors. The explanation below section 13(9) contains the definition of record date and amount outstanding. The said explanation is reproduced as under:

(a) "record date" means the date agreed upon by the secured creitors representing not less than three-fourth in value of the amount outstanding on such date."
(b) "amount outstanding" shall include principal, interest and any other dues payable by the borrower to the secured creditor in respect of secured aset as per the books of account of the secured creditor.

Thus, when an individual secured creditor acts, the question of consent of other creditors upon a record date doesnot arise. Therefore, the requirement of the agreed date is incorporated in sub-section (9) of section 13 which does not apply incase of individual secured creditor, but it can apply where a financial asset has been provided by a group of secured creditors acting simultaneously and jointly at a time or consortium of secured creditors. Only in such eventuality, the creditors will have to agree themselves on a record date for determining of the amount outstanding on such record date to enforce their right. If the requirement of consent of three-fourth creditors is to be considered even in case of individual secured creditor who has given financial assistance independently, other provisions will become redundant. Not only that, but the definition of "record date" and "amount oustanding" under section13(9) will also become surplusage. Such can never be the intention of the Parliament.

12. The learned counsel for the petitioners has not actively pressed the contention that the action cannot be taken in view of the provisions of section 15(2) of the SICA. However, even if we take up this issue, then also, amendment in section 15 of SICA inserted by virtue of section 41 of the Act, 2002 has a direct nexus with the provisins of section 13(9) of the Act and interpretation of section 13(9). As the amendment inserted in SICA by virtueof section 41of the Act, it will mean that where the provisions of the Act are invoked, the Reference before BIFR will be bad where an individual secured creditor has invoked the provisions

of section 13 of the Act to enforce his security interest. Secondly, a reference pending before BIFR shall abate where a group of creditors or consortium of creditors has acted under section 13(9) with a written consent of secured creditors representing not less than 3-4th in value of the amount outstanding and have taken measures to recover their secured debts under sub-section (4) of section 13 of the Act.

Thus, the provisions of section 15 of SICA are not applicable in view of the amendment. Moreover, as per section 35, the provisions of the Act have overriding effect over all other laws including SICA. As such, the respondent bank who has independently financed a financial asset to the petitioner company does not required consent of three-fourth creditors. In view of the objects and reasons of the Act, condition required under section 13(9) would not be applicable in cases where an individual secured creditor takes action under section 13(4)of the Act.

13. It is well settled that where an individual secured creditor has financed a financial asset and has a security interest, if the borrower in taking financial asset from other creditors clubbing the security, either it can be said to be a fraud on the part of the borrower or whenever any asset of the creditor is secured, then particular property is made secured either by hypothecation or mortgage in any manner. Overlapping security after taking action under section 13(4) by a secured creditor, residue will be given to the person entitled to it. As the single secured creditor is not barred by any provisions of law for taking action under section 13(4) of the Act, where by giving a notice in writing to discharge in full his liability to the secured creditors within 60 days from the date of notice, fails when secured creditor shall be entitled to exercise all or any of the rights under sub-section (4). When the borrower who is under the liability to secured creditor under a security agreement makes any default in payment of secured debt or any instalment therefor and his action in respect of such debt is classified by the secured creditor as non-performing asset. The action of an independent singular secured creditor whose asset is 100% is not barred by any provisions of law for taking any recourse under sub-section(4) of section 13 of the Act. Thus, I do not find any force and susbtance in the contentions raised by the learned counsel for the petitioners.

14. The contention of the learned counsel for

the respondent bank that a statutory appeal is provided under section 17 of the Act and this petition is liable to be dismissed cannot be accepted. As an alternative remedy is available by way of an appeal under section 17 of the Act against action taken under section 13(4) of the Act but these petitions are entertainable in view of the fact that these petitions have been filed against notice issued by the respondent creditor bank under sub-section (2) of section 13 of the Act. When the action is taken under sub-section (4) of section 13, then the appeal would be available for the petitioner under section 17(1) of the Act. As the provisions of section 17(1) of the Act provides that any person including borrower aggrieved by any of the measures refererd to in sub-section (4) of section 13, taken by secured creditor or his authorised officer under this chapter may prefer any appeal to DRT having jurisdiction in the matter within 45 days from the date on which such measures have been taken. In the present case, notice has been challenged. But action under section 13(4) have not yet been taken. Therefore, the remedy of appeal is not available to the petitioner. Therefore, the contention raised by the learned advocate for the respondent in this behalf fails.

15. In the facts and circumstances stated above and the legal position, I do not find any good reason calling for interference with the impugned notice in view of the statutory provisions of law. These petitions are therefore, devoid of any merit and they are dismissed at the admission stage. Notice is discharged in each of the petitions. Interim order, if any, stands vacated.

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After pronouncement of this judgment, the learned counsel for the petitioners requested this Court to continue the interim relief already granted by this Court for a period of two weeks from today to approach higher forum. Learned counsel for the respondent has no objection if interim relief granted by this Court is continued for a period of one week from today. Accordingly, interim relief granted by this Court will continue for a period of one week from today.

(Kundan Singh,J)

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